

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated June 29, 2017, which found that the appellant did not meet four of the five statutory requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement. However, the ministry was not satisfied that the evidence establishes that:

- the appellant's impairment is likely to continue for at least two years;
- the appellant has a severe physical or mental impairment;
- the appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and,
- as a result of these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (EAPWDA), Section 2

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), Section 2

PART E – Summary of Facts

The appellant was not in attendance at the hearing. After confirming that the appellant was notified, the hearing proceeded under Section 86(b) of the Employment and Assistance Regulation.

Information before the ministry at reconsideration

- PWD application comprised of the appellant's Self-Report (SR) dated February 28, 2017, a Medical Report (MR) and an Assessor Report (AR) dated March 17, 2017, completed by the appellant's general practitioner (GP) who has known the appellant since May 2015 and seen her 2-10 times. The GP used several sources to complete the AR such as file chart information, investigations and other professionals notably a physiatrist and a mental health team.
- Outpatient Nutrition Services Referral dated March 21, 2016.
- Consultation/ Assessment dated November 16, 2016 by GP2.
- Initial Mental Health Assessment Report dated February 7, 2017.
- Mental Health Discharge Summary Report dated February 14, 2017.
- Appellant's Medical Chart Summary (15 pages) dated March 27, 2017.
- Assessment and Diagnostic for Fibromyalgia dated April 7, 2017 by GP3.
- Referral Letter dated June 6, 2017 by the appellant's GP.
- The appellant's Request for Reconsideration dated June 16, 2017.

Diagnoses

In the MR, the GP diagnosed the appellant with obstructive sleep apnea, obesity, chronic pain syndrome/fibromyalgia and hypertension. In the AR where asked to describe the appellant's mental or physical impairments that impact her ability to perform daily living activities, the GP wrote chronic back and leg pain.

Degree and Course Impairment

In the MR when asked "Is the impairment likely to continue for two years or more from today?", yes or no is not indicated however when asked "What is the estimated duration of the impairment and are there remedial treatments that may resolve or minimize the impairment?", the GP wrote unsure, weight loss, control OSA and mobility with physio and perhaps trigger point injections will help.

Physical Impairment

In the MR, the GP reported that:

- In terms of health history, the appellant has c/o daily pain, good mobility thoracolumbar and cervical spine, pain posterior ribs with rotation, pain paraspinal muscles and leg pain when walking. She does daily living chores, does get to the office for appointments, is trying hard to lose weight and remain mobile and active. Helps if she can move about but currently work as a nurse in a hospital setting would be difficult.
- The appellant does not require any prostheses or aids for her impairment.
- For functional skills, the appellant can walk 1 to 2 blocks unaided, climb 5+ steps unaided, lift 7 to 16 kg (15 to 35 lbs.) and remain seated for less than 1 hour.
- Under additional information that the GP considers relevant to an understanding of the significance of the appellant's medical condition, it is noted that the appellant has chronic pain due to fibromyalgia which is being addressed and has a number of comorbidities which are

also being addressed, The GP believes that the appellant will improve with weight loss, conditioning and symptom management.

- Under additional comments regarding degree of restriction it is noted “depends if fatigue, tends to rest, pain is an issue, attending pain clinic”.

In the AR, the GP reported that:

- The appellant requires periodic assistance from another person with lifting (especially overhead) and carrying and holding.
- The appellant is independent with walking indoors and outdoors, with climbing stairs and standing.

In the referral letter, the GP added that the appellant has indicated that she is unable to lift and carry her 7lbs. dog, has her groceries packed in multiple small amounts and that she walks if she has to get anywhere or tries to get a ride as she refuses to use public transit as it is too bumpy and she has to brace herself and hang on if turning and stopping. “Walking precipitates muscle spasms in her legs daily.”

In her Self-Report and Request for Reconsideration, the appellant wrote that:

- If she walks more than a block she has to sit down because of back and hip pain.
- If she twists from the waist and has to hold that position even for a short period her ribs, arms and back go into spasms.
- She takes large doses of medication for fibromyalgia so that she can function enough to take care of her personal hygiene, cooking, some dishes, drive, walk, exercise and rest.
- She loses feeling in one to all limbs; she can't sit or stand for long periods.
- She loses her balance easily.
- She doesn't dance or play with kids anymore.

Mental Impairment

In the MR, the GP reported:

- The appellant has no difficulties with communication.
- The appellant has anxiety about financial issues and no other significant deficits for her cognitive and emotional functioning.

In the AR, the GP reported:

- The appellant has a good level of ability to communicate in areas of speaking, hearing, reading and writing.
- For the 14 areas of the AR assessing impacts to cognitive and emotional functioning and social functioning, the GP did not indicate any moderate or major impacts, while noting 2 minimal impacts, Emotion and Motivation, with comments that the appellant gets anxious especially due to financial issues and sometimes feels hopeless, does not see a solution.

In the Mental Health Discharge Summary Report dated February 14, 2017, it was noted that while the appellant was referred for counselling there is no indication for psychiatric assessment at this time and should the appellant deteriorate she is aware how to assess urgent mental health services in the community.

In her Self-Report and Request for Reconsideration, the appellant wrote that:

- Her attention span and memory are affected because of facial pain and migraines. She searches for words for common things and if she has to speak publically which was never a problem before, she will stutter and lose her train of thought.

- Emotionally, she is fragile because of the loss of private insurance and each day she has to fight herself to keep going even if she lives in pain.
- She has situational depression.
- She has gone to the local hospital where she told of her persistent thoughts of killing herself because it was the third and the darkest time of going through withdrawal since February 2017.

Daily Living Activities (DLA)

In the MR, the GP reports that the appellant has not been prescribed medication that interferes with her ability to perform DLA. Noted is the appellant is “Awaiting assessment at the pain clinic.”

The GP also reports a periodic restriction in the appellant’s ability to perform the following DLA: personal self care, basic housework, daily shopping, and mobility outside the home. The GP explains that the appellant will have difficulty bathing, and sometimes dressing due to fatigue, back pain and spasm in legs. Additionally, the GP reports that the appellant is able to do some housework and shop – not on a daily basis.

In the AR, the GP reports:

- Under Personal care - grooming, toileting, feeding self, regulate diet and transfers in/out of bed and off/on chairs are managed independently, while periodic assistance from another person is required for dressing and bathing (if fatigued).
- Basic housekeeping is managed independently (not able to do all housekeeping).
- Under Shopping – going to and from stores, reading prices and labels and making appropriate choices are managed independently, while periodic assistance from another person is required for paying for purchases and carrying purchases home (financial issues, sometimes back pain).
- Meals, Paying rent and bills and Medications are managed independently.
- Under Transportation – getting in and out of a vehicle and using transit schedules/arranging transportation are managed independently while periodic assistance for using public transit is required (difficult if walking long distance).
- Social Functioning is managed independently and the appellant is noted to have good functioning with both the immediate and extended social networks.

In her Self-Report and Request for Reconsideration, the appellant wrote that:

- Daily hygiene is a struggle because of pain and fatigue; it takes about an hour to wash herself and hair.
- She sits down in tub to prevent any falls and uses a detachable shower to get wet.
- She has vision trouble in the afternoon, blurry vision, cannot read road signs, books or watch TV.
- She doesn’t go out to visit family/friends because of unpredicted diarrhea, pain and migraines.
- She has difficulty with balance so dressing in pants is difficult if she stays standing.
- Housework is done sporadically, she can no longer accomplish household chores all in one day and she makes choices each day according to how she feels.
- She has a loss of appetite, so she doesn’t eat very often and sticks to healthy foods that don’t require a lot of preparation.

In the referral letter, the GP added that the appellant sometimes needs help washing her hair, finds dressing difficult as bending to put on socks and pants precipitates muscle spasms in her back and sometimes the appellant can't put on her bra because of spasms in her upper back and neck and between scapula.

Need for Help

In the PR when asked "What assistance does your patient need with DLA?" the GP responds "none".

In the AR, the GP indicates "family" under assistance provided by others. In the section of the AR relating to assistance provided through the use of assistive devices, the GP identifies a cane as an item that the appellant routinely uses to help compensate for her impairment.

Notice of Appeal

In the Notice of Appeal dated July 13, 2017, the appellant writes that due to the unpredictable nature of her illnesses, fibromyalgia and irritable bowel syndrome, she is at the mercy of her own body. She states that she had a very high number of sick days when she did work and had to give up a 30 year career in healthcare. She indicates that she has difficulty with daily living activities.

Hearing

At the hearing, the ministry relied on its reconsideration decision.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry decision that determined that the appellant did not meet four of the five statutory requirements of Section 2 of the EAPWDA for designation as a person with disabilities (PWD) is reasonably supported by the evidence or is a reasonable application of the legislation in the circumstances of the appellant. The ministry found that the appellant met the age requirement.

However, the ministry was not satisfied that the evidence establishes that:

- the appellant's impairment is likely to continue for at least two years;
- the appellant has a severe physical or mental impairment;
- the appellant's DLA are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and,
- as a result of these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

The following Sections of the EAPWDA apply to this appeal:

2 (1) In this section:

"assistive device" means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

"daily living activity" has the prescribed meaning;

"prescribed professional" has the prescribed meaning.

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person is in a prescribed class of persons or that the person has a severe mental or physical impairment that

(a) in the opinion of a medical practitioner is likely to continue for at least 2 years, and

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

(ii) as a result of those restrictions, the person requires help to perform those activities.

(3) For the purposes of subsection (2),

(a) a person who has a severe mental impairment includes a person with a mental disorder, and

(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

The following Section of the EAPWDR applies to this appeal:

2 (1) For the purposes of the Act and this regulation, "daily living activities",

(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:

(i) prepare own meals;

(ii) manage personal finances;

(iii) shop for personal needs;

(iv) use public or personal transportation facilities;

(v) perform housework to maintain the person's place of residence in acceptable sanitary condition;

(vi) move about indoors and outdoors;

(vii) perform personal hygiene and self care;

(viii) manage personal medication, and

(b) in relation to a person who has a severe mental impairment, includes the following activities:

- (i) make decisions about personal activities, care or finances;
 - (ii) relate to, communicate or interact with others effectively.
- (2) For the purposes of the Act, "prescribed professional" means a person who is
- (a) authorized under an enactment to practise the profession of
 - (i) medical practitioner,
 - (ii) registered psychologist,
 - (iii) registered nurse or registered psychiatric nurse,
 - (iv) occupational therapist,
 - (v) physical therapist,
 - (vi) social worker,
 - (vii) chiropractor, or
 - (viii) nurse practitioner, or
 - (b) acting in the course of the person's employment as a school psychologist by
 - (i) an authority, as that term is defined in section 1 (1) of the Independent School Act, or
 - (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the School Act, if qualifications in psychology are a condition of such employment.

Duration

As the ministry noted, in the PR, the GP when asked; "What is the estimated duration of the impairment and are there remedial treatments that may resolve or minimize the impairment?" the GP wrote unsure, weight loss, control OSA and mobility with physio and perhaps trigger point injections will help.

The evidence provided by Section 2(2)(a) of the EAPWDA requires that an applicant have a severe mental or physical impairment that in the opinion of a medical practitioner or nurse practitioner is likely to continue for at least 2 years. The appellant's physician, who is a medical practitioner, does not indicate either yes or no in the space provided to make a confirmation. With consideration for the above, the panel finds that the ministry reasonably determined that the appellant did not meet the legislative criteria of duration pursuant to Section 2 (2) of the EAPWDA.

Severe Impairment

In the reconsideration decision, the ministry was not satisfied that the information provided establishes a severe physical or mental impairment. Determining a severe physical or mental impairment requires weighing the evidence provided against the nature of the impairment and its reported functional skill limitations. A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. An "impairment" is a medical condition that results in restrictions to a person's ability to function independently or effectively for a reasonable duration. To assess the severity of impairment, the ministry must consider the nature of the impairment and the extent of its impact on daily functioning.

Severe Physical Impairment

The ministry finds that the information provided in the appellant's PWD application demonstrates that she experiences limitation to her physical functioning due to leg and back pain. However, the ministry determined that the assessments provided by the GP speak to a moderate rather than a severe physical impairment. Based on the information provided the ministry cannot determine that the appellant has a severe physical impairment.

In the MR, the GP diagnosed the appellant with obstructive sleep apnea, obesity, chronic pain syndrome/fibromyalgia and hypertension. As noted by the ministry, the GP indicated that the appellant does not need any prostheses or aids for her impairment; however, in the AR it is indicated that the appellant routinely uses a cane to help compensate for her impairment. The MR indicates that the appellant's functional skills are: can walk 1 to 2 blocks unaided, climb 5+ steps unaided, lift 15-35 lbs. and remain seated for less than one hour. In the AR the GP indicated that the appellant requires periodic assistance from another person with lifting (especially overhead) and carrying and holding while she independently manages walking indoors and outdoors, climbing stairs and standing.

Under additional information in the MR that the GP considers relevant to an understanding of the significance of the appellant's medical condition, it is noted that the appellant has chronic pain due to fibromyalgia which is being addressed and has a number of comorbidities which are also being addressed. The GP believes that the appellant will improve with weight loss, conditioning and symptom management.

In the referral letter, the GP added that the appellant has indicated that she is unable to lift and carry her 7lbs. dog, has her groceries packed in multiple small amounts and that she walks if she has to get anywhere or tries to get a ride as she refuses to use public transit as it is too bumpy and she has to brace herself and hang on if turning and stopping. "Walking precipitates muscle spasms in her legs daily."

Based on the above information, the panel finds that while the appellant has limitations to her physical functioning due to chronic pain from fibromyalgia, her GP has reported that it is being addressed along with a number of comorbidities and that the GP believes will improve with weight loss, conditioning and symptom management. The panel concludes that the ministry was reasonable to determine that the GP's assessment of current physical functioning reflects a moderate not severe physical impairment. Therefore, the panel finds that the ministry was reasonable in its determination that the evidence does not support a finding that the appellant suffers from a severe physical impairment pursuant to Section 2(2) of the EAPWDA.

Severe Mental Impairment

The ministry finds the information provided by the appellant's GP demonstrates that the appellant experiences anxiety due to her financial situation and determines that the information provided does not establish that the appellant has a severe mental impairment.

In the MR, the GP did not diagnose a medical condition giving rise to impairment; however, the GP notes that the appellant experiences significant deficits with her cognitive and emotional functioning as follows: 2 minimal impacts in the areas of emotion and motivation and notes that the appellant gets anxious especially due to financial issues. The GP further notes that the appellant sometimes feels hopeless, does not see a solution. The GP indicated that the appellant has no difficulties with communication and in the AR indicated that the appellant's speaking, hearing, writing and reading are good. In the AR all listed areas of social functioning were noted as independent and good functioning was reported with both the immediate and extended social networks.

In the Mental Health Discharge Summary Report, it was noted that while the appellant was referred for counselling, there is no indication for psychiatric assessment at this time.

The legislation requires that the minister must be satisfied that a person has a severe mental or physical impairment. While the panel notes that the appellant indicated that she experiences situational depression and is emotional fragile because of the loss of her private insurance; it has been reported in the Mental Health Discharge Summary Report that should the appellant's mental health deteriorate, she is aware how to assess urgent mental health services in the community. In addition, even though the assessment of the GP indicated deficits in cognitive and emotional functioning in the areas of emotion and motivation, no information was provided as to how these deficits impact the appellant's functioning. Therefore, the panel finds that the ministry reasonably determined that the assessment provided by the GP does not establish a severe mental impairment pursuant to Section 2(2) of the EAPWDA.

Restrictions in the ability to perform DLA

The ministry relies on the medical opinion and expertise from the appellant's GP to determine that the appellant's impairment significantly restricts her ability to perform DLA either continuously or periodically for extended periods. The ministry makes the decision regarding Persons with Disabilities eligibility based on the physical, mental and daily living assessments provided by the medical practitioner as well as the appellant's self-report.

The ministry finds that the assessments provided by the GP are indicative of a moderate level of restriction and the information does not establish that severe impairment directly and significantly restricts DLA either continuously or periodically for extended periods of time. The ministry acknowledges that the appellant has certain limitations resulting from leg and back pain. However, the frequency and duration of these periods are not described in order to determine if they represent a significant restriction to the appellant's overall functioning.

Considering the appellant's medical history, it is reasonable to expect that the appellant would encounter some restrictions to her ability to perform DLA and require assistance as a result. However, the ministry finds that there is not enough evidence to confirm that the appellant's impairment significantly restricts her ability to perform DLA continuously or periodically for extended periods.

In the MR, the GP reports that the appellant has not been prescribed medication that interferes with her ability to perform DLA.

The GP also reports a periodic restriction in the appellant's ability to perform the following DLA: personal self care, basic housework, daily shopping, and mobility outside the home. The GP explains that the appellant will have difficulty bathing, and sometimes dressing due to fatigue, back pain and spasm in legs. Additionally, the GP reports that the appellant is able to do some housework and shop – not on a daily basis.

In the AR, the GP reports that periodic assistance from another person is required for dressing and bathing (if fatigued), making appropriate choices when shopping, paying for purchases and carrying purchases home (financial issues), and for using public transit (difficult if walking long distance).

In the referral letter, the GP added that the appellant sometimes needs help washing her hair, finds dressing difficult as bending to put on socks and pants precipitates muscle spasms in her back. The appellant refuses to use public transit as it is too bumpy and she has to brace herself and hang on if turning and stopping and then feels muscle spasms in her back and legs daily.

According to the legislation, the ministry must assess direct and significant restrictions to DLA in consideration of the opinion of a prescribed professional, in this case the appellant's GP. This does not mean that the other evidence is not factored in as required to provide clarification of the professional evidence, but the legislative language makes it clear that a prescribed professional's evidence is fundamental to the ministry's determination as to whether it is "satisfied." The prescribed professional completing the assessments has the opportunity to indicate which, if any, DLA are significantly restricted by the appellant's impairments either continuously or periodically for extended periods. In the opinion of a prescribed professional, a person's ability to perform daily living activities must be directly and significantly restricted either continuously, or periodically for extended periods.

The panel finds that the ministry's determination that this criterion is not met is a reasonable application of the legislation as there is insufficient information as to the frequency and duration of the periodic assistance that is required and no indication as to how much longer the appellant takes to perform DLA, thus it is difficult to determine if this restriction is significant. The panel finds that the ministry was reasonable in its determination that there is not enough evidence to confirm that the appellant's impairment significantly restricts DLA continuously or periodically for extended periods pursuant to Section 2(2)(b)(i) of the EAPWDA.

Help to perform DLA

The ministry finds that as it has not been established that DLA are significantly restricted continuously or periodically for extended periods, it therefore cannot be determined that significant help is required from other persons. The use of a simple assistive device such as a cane does not establish the existence of a severe impairment.

Section 2(2) (b) (ii) of the EAPWDA requires that, as a result of direct and significant restrictions in the ability to perform DLA, a person requires help to perform those activities. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

While the appellant's GP responded "none" to the question, "What assistance does your patient need with DLA", the panel finds that the evidence does show that the appellant routinely uses a cane and periodically requires help to perform certain DLA.

With consideration for the above, the panel finds that the ministry reasonably determined that as direct and significant restrictions in the appellant's ability to perform DLA have not been established, it cannot be determined that the appellant requires help to perform DLA as a result of those restrictions, as defined by Section 2(3)(b) of the EAPWDA.

Conclusion

The panel finds that the ministry's reconsideration decision, which determined that the appellant was not eligible for PWD designation under Section 2 of the EAPWDA, was reasonably supported by the evidence and therefore confirms the decision. The appellant's appeal, therefore, is not successful.